EMPLOYMENT TRIBUNALS

Claimant: Mr M Nemec	**Respondent: Concept Recruitment Group Ltd**
Heard at Leeds ET	**On: 9, 10 November 2022**
Before	**Employment Judge Davies** **Mr T Downes** **Mr I Taylor**
Appearances	
For the Claimant:	**In person**
For the Respondent:	**Mr J Webb (Operations Director)**

RESERVED JUDGMENT

1. The Claimant's complaints of direct race discrimination and harassment related to race are not well-founded and are dismissed.

REASONS

Introduction

1. These were complaints of direct race discrimination and harassment related to race brought by the Claimant, Mr M Nemec, against Concept Recruitment Group Ltd, a recruitment agency. The Claimant represented himself and the Respondent was represented by Mr J Webb (Operations Director).

2. There was a short, agreed file of documents, and the Tribunal considered them all. The Claimant had recorded lots of conversations and incidents. The Respondent had prepared transcripts of the conversations with its employees. The Claimant agreed that they were accurate, save that he explained that at one point in one call he had been put on hold. The Tribunal did not need to listen to those recordings because the transcript was agreed. The Claimant wanted the Tribunal to listen to one further recording, of an incident at the Card Factory. Mr Webb very helpfully played it on his computer so that everybody could see and hear it. It was an audio recording, but the Claimant had annotated it with a transcript and commentary.

3. The Tribunal heard evidence from the Claimant. For the Respondent, we heard evidence from Mr J Cooper (Recruitment Manager), Ms T Stanway (Regional Business Manager) and Mr G Stead (Distribution Manager at the Card Factory).

4. The case had originally been listed for a three-day hearing, with the third day set aside for the Tribunal to reach its decision, give judgment and deal with remedy if appropriate. Because of a lack of judicial resource, the listing was reduced, in advance, to two days, so that the evidence and submissions could be concluded and the Tribunal could reach its decision at a later date. This meant that the hearing could go ahead on 9 November 2021.

5. At the start of the hearing, the Tribunal discussed a timetable with the parties. Mr Webb agreed that he needed about two hours to question the Claimant. The Claimant said that he had about 5 questions prepared for each of the Respondent's witnesses. The Tribunal therefore suggested that we allocate 30 minutes for each Respondent witness and the Claimant agreed. When the Respondent's witnesses gave evidence, the Claimant indicated that he had concluded all his questions for each witness within the time allocated. The Judge then encouraged him to make sure he had asked questions about all the issues, and to put to the witnesses his case that they had discriminated against him because he is not Polish. He asked some more questions with the Judge's encouragement. His questions were not cut short. At the end of each witness's evidence, he confirmed that he did not have any more questions. The evidence was therefore concluded on the first day. The Judge explained that each party could sum up its case the next day and that thirty minutes each would be allocated.

6. At the start of the second day, the Claimant had produced late evidence overnight, namely Google reviews of the Respondent; correspondence between the parties and the Tribunal; and evidence of vacancies being advertised by the Respondent very recently. Mr Webb said that the late evidence was not relevant and objected to it being produced at this late stage. However, he agreed with the Judge's suggestion that if it was not relevant, it might be more straightforward to admit the new material and allow the Claimant to comment on it, and Mr Webb could explain why he said it was irrelevant. The Tribunal accepted the new material on that basis. Of course, none of the witnesses had been asked questions about it.

7. The Claimant then asked when he would have the opportunity to cross-examine Mr Webb. The Judge explained that Mr Webb was not giving evidence, he was the Respondent's representative. The Respondent could choose which witnesses to call. It had done so, and the Claimant had had the chance to question them. If he wanted to make points about inconsistencies in the response or amended response, or points about correspondence from Mr Webb, he could do so in his closing arguments.

8. The Tribunal heard Mr Webb's closing arguments first. We provided the Claimant with a pen and paper to make notes of any points he wanted to respond to, and we ensured that Mr Webb went slowly enough for him to do so. Mr Webb concluded his arguments in 30 minutes. The Tribunal then took a 25-minute break, to enable the Claimant to reflect on Mr Webb's points before

making his closing arguments. The Claimant said that he did not think 30 minutes would be long enough for his closing arguments. The Tribunal said that if he still had relevant points to make, we would consider whether to allow him additional time. In the event, the Claimant's closing submissions took 50 minutes and the Tribunal allowed him that time. At the end, he confirmed that he had said everything he wanted to say.

9. In his closing arguments, the Claimant referred to an email Mr Webb had sent the Tribunal on 29 June 2022. In that email, Mr Webb said that the Claimant had telephoned him laughing and saying how much he was going to win and then hanging up. Mr Webb asked that the Claimant be warned about his conduct. The Claimant responded. He attached a file said to contain the last 41 seconds of the phone call. The Tribunal does not open such attachments. The Claimant said that he and Mr Webb were discussing serious things, there was no laughing, and the call ended because his battery ran out. He accused Mr Webb of dishonesty and trying to discredit him. He said that Mr Webb was trying to get his claim struck out and accused him of victimisation. He did not ask the Tribunal to do anything specific. The correspondence was dealt with by a letter from a Tribunal Judge. No warning was given and no other action was taken. The Claimant referred to this in his evidence and in his closing arguments. The Tribunal did not explore it any further at this hearing. It would not have been proportionate to do so. Mr Webb thought the Claimant had hung up on him; the Claimant explained that his phone battery had run out. Mr Webb said that the Claimant had been laughing; a recording of the last 41 seconds of the call only would not have resolved that. The fairness of the hearing was not affected either way.

Issues

10. The Claimant is from the Czech Republic and he compares his treatment with people from Poland. The issues for the Tribunal to decide at this hearing were set out in a case management order made by EJ Knowles, following a preliminary hearing on 7 June 2022. They were:

Direct race discrimination

10.1 Did the Respondent do the following things:

- 10.1.1 Tell the Claimant that he could not go back to the Card Factory because the person(s) who attacked him (Worker D and others) were still there;
- 10.1.2 Tell the Claimant that the manager at the Card Factory did not want him there;
- 10.1.3 Tell the Claimant that the Respondent did not have any other work apart from the Card Factory;
- 10.1.4 Offer the Claimant work at IFCO in Normanton then not give him the work;
- 10.1.5 Offer the Claimant work with two other clients then not give him that work;
- 10.1.6 Tell the Claimant in November 2021 to "go and register somewhere else."

10.2 If so, was it less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. The Tribunal will decide whether he was treated worse than a Polish worker would have been treated. He says that he was, including those workers who threatened and attacked him, including a worker referred to in these proceedings as Worker d.

10.3 If so, was it because of race?

10.4 Was the treatment a detriment?

Harassment

10.5 Did the Respondent or its workers threaten and assault the Claimant?

10.6 If so, was it unwanted conduct?

10.7 Did it relate to race?

10.8 Did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

10.9 Is the Respondent liable for the actions of its workers?

Findings of fact

11. The Respondent is a recruitment agency. It has workers of very many nationalities on its books. The Claimant is an experienced machinist from the Czech Republic. He has lived and worked in the UK for a number of years. He worked for around five years for his previous employer in Dewsbury, but lost his job because of the pandemic.

12. In June 2021 the Claimant registered with the Wakefield branch of the Respondent. He says that he was asked whether he was Polish when he registered. He told them he was from the Czech Republic. The Respondent says that it asks people their nationality because it needs to check their right to work.

13. The Claimant was placed at a client of the Respondent called YPO. He worked there until the placement ended.

14. Around this time, the Claimant moved into a flat with his girlfriend. It was in a shared block. There were lots of Polish people living there. The Claimant says that a group of them behaved anti-socially. They sat on the steps at the entrance to the building drinking and taking drugs at night. He started openly recording their anti-social behaviour on his phone, and reporting them to the anti-social behaviour officer and the letting agency. This led to him being verbally abused by the individuals at his flat. The Claimant says that on one occasion the group said to each other, in Polish, "All for one and one for all." On another occasion, they said, "Today was amazing, there were Polish people everywhere," and, "No action will be taken against Polish people."

15. The Respondent placed the Claimant with another of its clients, Card Factory. He started there on 11 August 2021. There were lots of Polish workers there and three Polish supervisors. Mr Stead told the Tribunal that the Card Factory has a very diverse workforce. There are lots of Polish workers but lots of other nationalities too. It has about 300 full-time employees and up to 300 agency workers. There are 32 managers, including the two or three Polish team leaders.

16. About two weeks after starting there, the Claimant noticed that some of the people who lived in his block of flats and with whom he was having problems because of their anti-social behaviour were working at the Card Factory. This includes somebody referred to at the Tribunal as Worker D. Worker D was another agency worker with the Respondent.

17. The Claimant says that this group of workers started threatening him at work. After three days of such treatment, on 27 August 2021 he went to work with his mobile phone audio recording and he secretly recorded Worker D threatening him and asking him to go outside for a fight. The Claimant shared the footage with his supervisor, Lee, who reported it to his manager. Worker D was suspended as a result.

18. Management at the Card Factory informed Ms Stanway, the Respondent's Regional Business Manager, who had responsibility for the Wakefield office, on the same day. She was told that Worker D had been sent home.

19. Ms Stanway and Mr Cooper gave evidence that they did not know about any issue between the Claimant and Worker D before the incident on 27 August 2021. In cross-examination, the Claimant said for the first time that he had told Mr Cooper about it in a phone call before 27 August 2021. Mr Cooper said that had not happened. The Tribunal thought that the Claimant was incorrect. If he had told Mr Cooper before 27 August 2021, we would expect him to have said so before.

20. The Claimant carried on working at the Card Factory. Monday 30 August 2021 was a bank holiday, but he worked Tuesday, Wednesday and Thursday of that week. He did not go to work on the Friday. He texted at 5:46am to say that he could not attend. He had an appointment with a solicitor about his problems with anti-social behaviour at his flat. His evidence to the Tribunal was that he was assaulted by Worker D and one of his friends on his way to the appointment and ended up in hospital.

21. On Monday 6 September 2021 the Claimant emailed the Respondent to say that he had been attacked and had a broken bone. In due course, he provided a sick note, signing him off work from 3 September 2021 to 27 September 2021.

22. There was an issue with his pay. On 13 September 2021 he emailed about a missing day's pay from the week commencing 30 August 2021. Ms Stanway sent an email to payroll on 15 September 2021, saying that she had checked the fire registers at Card Factory and the Claimant was in three days but had only been paid for two. She noted that the Claimant had called about it the previous week. She attached copies of the fire register and asked for payment to be made. The missing day was then paid.

23. On 4 October 2021 the Claimant emailed to say that he would be ready to work from 6 October 2021 and asking for someone to call him. He attached an updated sick note, covering his absence until 4 October 2021. The team overlooked the sick note and did not send it to payroll. He sent the sick note again on 8 October 2021. He chased it up by telephone.

24. On 11 October 2021, the Claimant spoke to a member of staff at the Wakefield branch. He said that his sick note was finished last week but he was still not working. He also said that he was missing about £100 in sick pay. He was asked to send the sick note again. Eventually on 16 October 2021 Ms Stanway went through the emails, found the Claimant's second sick note, and forwarded it to payroll, asking them to ensure that he received his payment. He still did not.

25. The Claimant chased up again by phone on 20 October 2021 and was asked to call the next day. He did so. The person he spoke to, Robbie-Ann, wrongly insisted that his sick note ran out on 27 September 2021. During that call he was asked why he was not back at work and he said that he had not been told where to go. Robbie-Ann spoke to payroll and called the Claimant back. She told him that payroll had overlooked his second sick note and would pay him next Friday for the missing week. They then spoke about the Claimant returning to work. Robbie-Ann asked him if he was wanting to go back to Card Factory. He said that somebody had told him something about Dewsbury. Robbie-Ann asked him if it was Kolorcraft or Polymer. He did not know. He returned to the matter of his missing pay and said that he had no food in the fridge. He said that he could not get to work tomorrow because he had no money. The Claimant said that Mr Cooper had messaged him on 11 October 2021 to say that he would call him, but nobody did. Robbie-Ann asked the Claimant if he wanted to go back to the Card Factory and whether something had happened there. He told her that he had been threatened. Robbie-Ann then transferred the Claimant's call to Mr Cooper.

26. The Claimant told Mr Cooper that he had no food and that he had not worked since his sick note ended. Mr Cooper asked him if he had called to say he was looking for work. He said that he had called 5 times, sent the sick note 4 times, and sent text messages. He mentioned messaging before 4 October 2021 to say that he would be available after that; responding to a general call for candidates on 5 October 2021 by text; and receiving a message from Mr Cooper on 11 October 2021 saying that he would call the Claimant shortly. Mr Cooper said that it worked both ways and that the Claimant could have called him if he was looking for work. Mr Cooper then turned to the work that was available. He said "We can't send you to Torque and we can't send you to Card Factory. We've got Forza in Normanton …" The Claimant asked to be sent the postcode for the Normanton role. Then he returned to his missing sick pay again. Mr Cooper told him he would speak to payroll and call the Claimant back. He did so. He told the Claimant that he would receive his missing £96.35 by faster payment the next day. The Claimant was appreciative. Mr Cooper then turned back to the question of other work for the Claimant. The Claimant told him he had no problem with Card Factory. Mr Cooper told him that they had a duty of care to him and to Worker D. Worker D was still working at Card Factory. Mr Cooper did not want to put the Claimant in that situation where it

might happen again. The Claimant agreed that was possible. Mr Cooper then suggested a role at IFCO in Normanton. The Claimant asked him to send the postcode and name through. They agreed that the Claimant would call him the next day.

27. A number of points arise from the above telephone transcripts. In particular:

    27.1 The handling of the Claimant's sick pay was unacceptable. He repeatedly sent his second sick note through and explained when it expired, but it was overlooked and then not properly dealt with. He should not have had to keep chasing it up as he did. However, there is no complaint in these proceedings about that. When Mr Cooper found out what was going on, he took immediate action and arranged for a payment to be paid out of the payroll cycle, the following day.

    27.2 Mr Cooper originally agreed on 21 October 2021 that he would send the postcode for the Forza role to the Claimant and the Claimant would call him back the next day. He did not send those details through. However, his evidence to the Tribunal was that this was overtaken by the later part of their call on the same day, when the spoke about the IFCO role. Both were in Normanton, but he thought IFCO was a better fit for the Claimant because it was a more physical role, and less of a production line. The Tribunal accepted that evidence.

    27.3 It appeared clear to the Tribunal that Robbie-Ann was not identifying any vacancy in Dewsbury when she spoke to the Claimant about that. She was responding to the Claimant's question about Dewsbury roles by naming the Respondent's two Dewsbury-based clients to try and jog the Claimant's memory.

    27.4 The Claimant asked Mr Cooper in cross-examination why he could not send him to Torque. Mr Cooper said that the Claimant was on their "not required back list." The Claimant told the Tribunal he had never worked at Torque. Mr Cooper was insistent that the Claimant was on their list. The Tribunal was not able to resolve this on the evidence before us. But in any event, the conclusion of the conversation was that they would pursue the IFCO role for the Claimant, so any vacancies at Torque were not relevant.

    27.5 It seemed to the Tribunal that the Claimant had been chasing work to an extent, but he had not been calling and speaking to agents daily, and a number of his communications had been about missing sick pay rather than work. To an extent he was waiting for the Respondent to call him. It seemed to the Tribunal that those candidates who waited for the Respondent to call them back were less likely to be put into roles than those who got through to an agent and arranged the placement there and then by phone.

28. Mr Cooper did send the details of the IFCO role through to the Claimant on 21 October 2021. His evidence was that the Claimant did not call him back. The Claimant said that he called the office and spoke to a female member of staff who explained the shift system to him but then he heard nothing more. He did not provide a recording of this call, although he was clearly in the habit of recording his conversations with the Respondent.

29. Nonetheless, the Tribunal found that the Claimant may have called back about the IFCO role. When he spoke to Robbie-Ann on 1 November 2021 (see below) he did mention speaking to "you" about the IFCO role and nobody coming back to him.

30. However, the Tribunal also noted that the Claimant's late evidence included Google reviews of the Respondent, in which a number of candidates complain about not receiving calls back, being given false hope that jobs are available and so on. It is not possible to know the nationality of the authors of the reviews, but their names alone appear to suggest a level of diversity. The evidence before the Tribunal tended to suggest that there was a general issue with candidates not being called back.

31. As noted above, on 1 November 2021 the Claimant called again and spoke to Robbie-Ann. He said that he had been texting and calling and had not heard back. He said they had spoken about the IFCO role and he had not heard back. Robbie-Ann told him he needed to speak to somebody else and that they would call him back. She said that IFCO were not recruiting properly at that time. They were trying to persuade IFCO to let them have some new starters.

32. The Claimant called back later that day. He spoke to Mr Cooper who told him he had been away for a week. He checked the position, then told the Claimant that the lady he needed to speak to at IFCO was not in today and that he would call the Claimant tomorrow.

33. In fact, the Claimant called the office the next day and spoke to Ms Stanway. There was no recording of that call. She told the Tribunal that she told the Claimant that the only roles available were at Card Factory, and they could not place the Claimant there because of client request. She told him that it might be beneficial for him to register for work with other agencies. This was standard if the Respondent did not have a suitable position. Many candidates did not realise they could register with more than one agency. The Claimant said that Ms Stanway told him, "Go and register somewhere else." The Tribunal preferred Ms Stanway's explanation, that she was advising the Claimant that it might be a good idea to register with other agencies. When the Claimant asked Mr Cooper on 5 November 2021 about what Ms Stanway had said, Mr Cooper said something broadly similar to him. That is consistent with Ms Stanway's evidence that this was standard practice. The Respondent was not telling the Claimant to go away and register somewhere else; it was advising him that he could and should register with other agencies to maximise his chances of finding work.

34. Ms Stanway accepts that she told the Claimant on 2 November 2021 that their only open roles were at the Card Factory. Her evidence to the Tribunal was that this was because they were the only open roles. The Tribunal accepted her evidence. We noted that the Claimant relied on the fact that the Respondent was advertising lots of roles in July, August and September 2021. But Ms Stanway explained that vacancies were seasonal, and that different clients had different roles to fill at different times. They might have 10, 20 or 50 roles, but they would want them filling pretty much immediately. That meant that a role that was available on 21 October 2021 might well not be available on 2

November 2021. The Claimant also relies on an advert for a picker packer in Leeds that the Respondent advertised through Indeed on 5 November 2021. He spoke to Mr Cooper that day (see below) and Mr Cooper did not mention the role. Both Ms Stanway and Mr Cooper told the Tribunal that this was a Leeds role and would therefore be handled by their Leeds branch. They would not know about it in the Wakefield branch. Although the Claimant was looking at the role when he spoke to Mr Cooper on 5 November 2021, he did not ask Mr Cooper about the role and he did not apply for the role through Indeed. The Tribunal accepted the evidence that this was a role being recruited for by the Leeds office and was not known to the Wakefield team.

35. We have already mentioned that the Claimant spoke to Mr Cooper on 5 November 2021. This call was recorded. The Claimant told the Tribunal that he was trying to get Mr Cooper to confirm on tape what Ms Stanway had told him. He asked Mr Cooper what had happened with other roles and Mr Cooper told him that they were not available at the moment. The Claimant asked Mr Cooper why he was not allowed to go back to the Card Factory. He said that he was the victim and this was discrimination. Mr Cooper told him they were not discriminating against him. The client had requested that they did not send him back. The Claimant said that before Mr Cooper had told him something different. Mr Cooper repeated that the client had requested not to send him back. That was where they had the work at the moment and he could not send the Claimant there.

36. In his witness statement, Mr Cooper said that when he spoke to the Claimant on 21 October 2021 he did not know that the client did not want him back, because the question had not yet been asked as the Claimant was on sick leave. It was standard practice with anyone wanting to return to an assignment that they to speak to the client and discuss attendance, performance and time-keeping. In cross-examination, Mr Cooper said that when he spoke to Card Factory, they did not want the Claimant back, because of his attendance and time-keeping. His evidence was that this was why he told the Claimant he could not send him to the Card Factory on 5 November 2021. He said that Worker D was no longer at the Card Factory on 5 November 2021.

37. The Tribunal accepted Mr Cooper's evidence. We took account of the following:

    37.1 Mr Cooper agreed that he had said something different to the Claimant on 21 October and 5 November 2021, but he explained why that was.
    37.2 Mr Stead, the Distribution Manager from Card Factory, confirmed that they had decided they did not want the Claimant back. They looked at his attendance record. He had worked for four weeks and not once done a complete week. When they recruited through an agency they offered a full week's work. When they had candidates from an agency they looked at attendance across the week. If absence was high, it had a high impact on their daily output. People who had absences caused real problems. If someone had been with them a short period of time and not done a full week, they felt that they had to have the person who was there all the time instead. It may well have been the case that supervisors were happy with the Claimant's performance when he was at work, but

attendance and performance were different. The management team would discuss these things at daily and weekly meetings.

37.3 The Respondent provided evidence from its system of the hours the Claimant worked, which determined how much he was paid. They were as follows:

Week ending	Monday	Tuesday	Wednesday	Thursday	Friday
15/8	7.5	8	8	8	0
22/8	8	8	8	0.5	0
29/8	8	8	8	8	5
5/9	Bank Holiday	8	8 [missed and paid a week late]	8	0

37.4 The Claimant says that this record is not accurate. The Tribunal did not accept that evidence. His approach to his missing day's pay and his missing sick pay shows that if he had not been paid for hours he had worked, he would have raised this with the Respondent. He did not do so. The Tribunal therefore accepted that the Claimant did not reliably complete a full week's work during his four weeks at the Card Factory.

37.5 The Claimant pointed out that there were discrepancies between the Respondent's original ET3, its amended ET3 (following the preliminary hearing) and the witness evidence. The Tribunal noted that the ET3 suggested that the Claimant had provoked Worker D, that it was a joint decision between the Respondent and the Card Factory not to have the Claimant back, and that the reasons for that decision were said to be not only his attendance but also the fact that he had been filming and recording his colleagues covertly at work. That was different from the evidence given by the witnesses. Further, we accepted that the Claimant had not in fact filmed anybody at work, he had made an audio recording. However, there might be a number of reasons why the ET3 was different from the witness evidence. That is not uncommon. The ET3 is an initial response, prepared quickly and often before the detailed written evidence and witness evidence are assembled and reviewed. The Tribunal focussed on the evidence of the witnesses and the evidence from the time. We found all three of the witnesses honest and convincing and their evidence was consistent with the documents from the time.

38. All three of the Respondent's witnesses said that the Claimant's nationality or race had nothing to do with their treatment of him. There was nothing to suggest that it did or that the Claimant would have been treated any differently if he had not been from the Czech Republic or, specifically, if he had been Polish. They did or said the things they did for the reasons explained in their evidence and not because of his race or nationality.

39. As regards the decision not to have the Claimant back at the Card Factory, the Tribunal was shown evidence of a Polish worker who had worked for two weeks only at the Card Factory. The Tribunal was told that he was let go because of

his attendance. Of course, the Claimant was not really able to say if that was right or not, but there was no evidence before the Tribunal to contradict it.

Legal principles

40. Claims of race discrimination are governed by the Equality Act 2010. The Equality and Human Rights Commission's Code of Practice on Employment is relevant to discrimination claims and the Tribunal considered its provisions.

41. The burden of proof is dealt with by s 136 Equality Act 2010. The Tribunal had regard to the guidance about the burden of proof in *Igen Ltd v Wong* [2005] ICR 931. That guidance remains applicable: see *Royal Mail Group Ltd v Efobi* [2021] ICR 1263. The guidance outlines a two-stage process. First, the complainant must prove facts from which the Tribunal *could* conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA. The second stage, which only applies when the first is satisfied, requires the Respondent to prove that he did not commit the unlawful act. However, as the Supreme Court again made clear in *Efobi*, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

42. Direct discrimination is dealt with by s 13 Equality Act 2010. Under s 13, direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual or hypothetical comparator whose circumstances were not materially different. The second question entails asking why the employee received less favourable treatment. Was it because of a protected characteristic or was it for some other reason? It is necessary to explore the mental processes of the employer, to discover what facts operated on his or her mind: see *R (E) v Governing Body of the Jewish Free School* [2010] IRLR 136, SC. The protected characteristic need not be the only or even the main cause of the less favourable treatment; it must be an effective cause: see e.g. *London Borough of Islington v Ladele* [2009] IRLR 154, EAT. It is not always necessary to answer the first and second questions in that order. In many cases it is preferable to answer the "reason why" question, first.

43. Under s 26 Equality Act 2010, there are three elements to the definition of harassment: (1) unwanted conduct; (2) the specified purpose or effect; and (3) that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336. The employee must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that he has been unlawfully discriminated against. When a Tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of race, it is always relevant, at the first

stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of race: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT. The question whether conduct is related to a protected characteristic is not a question of "causation." The Tribunal must ask itself why the alleged harasser acted as he or she did.

Application of the law to the facts

44. Applying those legal principles to the findings of fact above, the Tribunal's conclusions on the issues were as follows.

Harassment

45. We started with the complaint of harassment, because it happened first. The Tribunal found that Worker D did threaten the Claimant at work. The Respondent accepted that it was liable for his conduct when he did so. The Tribunal found that this conduct was, of course, unwanted by the Claimant.

46. However, we found that the conduct was not related to race. It was a clear continuation of the dispute between the Claimant and Worker D and his friends, in their capacity as neighbours. Worker D and his friends were behaving anti-socially. The Claimant was openly filming them and reporting them to the anti-social behaviour officer and the landlord. That put them in conflict with one another and this is what led to the conduct in the workplace. The conduct did not relate to race, it related to their ongoing dispute. The fact that they were Polish and he was not was coincidental. The comments they made when the Claimant filmed them at the flats, about Polish people and "all for one, one for all" did not make their treatment of the Claimant "related to race." They may have been friendly with each other because they were Polish, but they were not in conflict with the Claimant was not because he was not Polish. They were in conflict with him was because he complained about their anti-social behaviour.

47. The complaint of harassment related to race therefore does not succeed.

Direct race discrimination

48. We turn next to the complaints of direct race discrimination. We have explained in the findings of fact above that we were able to make a clear finding on the evidence that none of the treatment of the Claimant about which he complains was because he is from the Czech Republic or is not Polish. We accepted the witnesses' explanations for their actions. In summary:

    48.1 Mr Cooper did tell the Claimant on 21 October 2021 that he did not want to send him back to the Card Factory because Worker D and others were still there. He did so because he did not want the Claimant to be put at risk. By this time, he had been told by the Claimant that Worker D had attacked him and broken his bone. Mr Cooper discussed other work opportunities with the Claimant instead. They agreed on IFCO. Mr

Cooper would not have acted any differently if the Claimant were not from the Czech Republic or were Polish.

48.2 Both Ms Stanway (2 November 2021) and Mr Cooper (5 November 2021) told the Claimant that the Card Factory did not want him back. That is because, by then, that was the situation. The Card Factory did not want the Claimant back because of his attendance record. The Respondent was acting in accordance with its client's wishes. Ms Stanway and Mr Cooper would not have acted any differently if the Claimant were not from the Czech Republic or were Polish. Even if part of the Card Factory's reasoning had been that the Claimant had been covertly recording his co-workers or that they thought he had provoked Worker D, that still would not have had anything to do with race or nationality.

48.3 Both Ms Stanway (2 November 2021) and Mr Cooper (5 November 2021) told the Claimant that they did not have any other work apart from the Card Factory. That is because, at that time, that was the situation. Vacancies that had been available on 21 October 2021 were no longer available. Ms Stanway and Mr Cooper would not have acted any differently if the Claimant were not from the Czech Republic or were Polish.

48.4 Mr Cooper did identify the option of working at IFCO in Normanton on Thursday 21 October 2021. He sent the Claimant the details through by text. Mr Cooper was away from Monday 25 to Friday 29 October 2021. The Claimant may have spoken to Robbie-Ann once during that week. It may be that she did not call him back. There was no basis whatsoever to infer that this was because he is from the Czech Republic or is not Polish. Robbie-Ann told him on Monday 1 November 2021 that they were having issues recruiting for IFCO. Mr Cooper was back in work on 1 November 2021. He said that he needed to speak to someone at IFCO the next day. The next day Ms Stanway told the Claimant that the only vacancies they had were at the Card Factory. That was the case. Ms Stanway and Mr Cooper would not have acted any differently if the Claimant were not from the Czech Republic or were Polish and there was no basis whatsoever for inferring that Robbie-Ann would have done so.

48.5 The Claimant was not offered work with two other clients and then not given it. The possibility of work at Forza was discussed on 21 October 2021, but the eventual decision that day was to pursue IFCO instead. That had nothing to do with his race or nationality. The Claimant was not offered any role at Dewsbury. He was not offered any role at Torque. Mr Cooper would not have acted any differently if the Claimant were not from the Czech Republic or were Polish and there was no basis whatsoever for inferring that Robbie-Ann would have done so.

48.6 Ms Stanway did suggest to the Claimant on 2 November 2021 that he should register with other agencies. Mr Cooper repeated this advice on 5 November 2021. The Tribunal found that this was not detrimental treatment. The Claimant was not being told to "go away" he was being advised, in his best interests, to register with other agencies as well to maximise his chances of finding work. Furthermore, Ms Stanway and

Mr Cooper would not have acted any differently if the Claimant were not from the Czech Republic or were Polish.

49. All the Claimant's complaints of direct race discrimination therefore do not succeed.

Employment Judge Davies

14 November 2022